85-171 (1)

No.

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1985

LUIS FRANK UGARTE,

Petitioner,

vs.

UNITED STATES LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

GEORGE J. CAPPIELLO, JR.
PHILLIPS & CAPPIELLO, P.C.
Attorneys for Petitioner
346 West 17th Street
New York, New York 10011
(212) 929-8410

2476
Lutz Appellate Printers, inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

66pp

QUESTIONS PRESENTED

1. Whether a shipowner may be liable for breach of its duty owed to a seaman under the Jones Act when it places its gangway in an area which does not provide returning crewmembers with safe access to the gangway.

2. Whether a shipowner may be found liable for breach of its duty to provide a seaman with a seaworthy vessel when it places a gangway in an area which does not provide returning crewmembers with safe access to the gangway.

3. Whether the Court of Appeals of the State of New York erred in granting respondent's motion for summary judgment by finding that petitioner did not adduce sufficient evidence to support its cause of action and in holding that the facts presented by petitioner were insufficient to state a cause of action.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 6

I. The decision below should be reviewed because it erroneously interprets the Jones Act as it related to a shipowner's non-delegable duty to furnish a seaman with a safe place in which to work beyond the gangway. 6

II. The decision of the court below should be reviewed because it failed to recognize that the warranty of seaworthiness owed by the shipowner to its seamen to provide a safe means of ingress and egress extends beyond the gangway. 12

III. The decision below should be reviewed because the Court of Appeals of the State of New York erred in granting respondent's motion for summary judgment

Contents

Page

by finding that petitioner did not adduce sufficient evidence to support its cause of action and by holding that the facts presented by petitioner were insufficient to state a cause of action. 15

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Aguilar v. Standard Oil Co. of New Jersey, 318 U.S. 724 (1944) 8, 9

Carney v. Pittsburgh and Lake Erie R.R., 316 F. 2d 277 (3rd Cir. 1963) 11

Carter v. Union R.R., 483 F. 2d 208 (3rd Cir. 1971) 7, 8

Chesapeake and Ohio Railway Co. v. Newman, 243 F. 2d 804 (6th Cir. 1957) 9

Gutierrez v. Waterman Steamship Co., 373 U.S. 206 (1963) 16, 17, 18

Hamilton v. Marine Carriers Corp., 332 F. Supp. 223 (E.D. Pa. 1971) 11

Hopson v. Texaco, Inc., 383 U.S. 262 (1966) 9, 10, 11, 12

Kearney v. Savannah Foods & Indus., Inc., 350 F. Supp. 85 (S.D. Ga. 1972) 12, 13, 14

Contents

Page

Kooker v. Pittsburgh and Lake Erie R.R., 258 F. 2d 876 (6th Cir. 1958) 7, 8

Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (2d Cir. 1945) 9

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943) 9

Romero Reyes v. Marine Enterprises, Inc., 494 F. 2d 866 (1st Cir. 1974) 12, 13, 14

Shenker v. Baltimore & Ohio R.R., 374 U.S. 1 (1963) 6, 7, 8

Sinkler v. Missouri Pacific R.R., 356 U.S. 326 (1958) ... 6, 9, 10, 11

Toddy v. Arkansas Valley Dredging Co., 470 F. Supp. 692 (E.D. Ark. 1979) 12

Statutes Cited:

Jones Act, 46 U.S.C. § 688 ..... 2, 3, 4, 10

Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §51 ..... 3, 7, 10

Admiralty Jurisdiction Act, 46 U.S.C. § 740 ..... 3, 17, 18

28 U.S.C. § 1257(3) 2, 18

28 U.S.C. § 2101(c) 2

Contents

Page

Rules Cited:

Civil Practice Laws and Rules of the State of New York (C.P.L.R.) § 5601(a)(ii) 2

New York State Court of Appeals Rules of Practice § 500.11(g) 2

APPENDIX

Order of Supreme Court of the State of New York, Special Term, Part I, Entered August 17, 1983 ..... 1a

Memorandum Decision of Justice Gammerman, Supreme Court of the State of New York, Special Term, Part I 2a

Order of the Appellate Division First Department Supreme Court of the State of New York, Dated November 8, 1984 ..... 6a

Memorandum Decision of the Appellate Division First Department Supreme Court of the State of New York, Dated November 8, 1984 ..... 8a

Notice of Appeal to New York State Court of Appeals .. 10a

Order of the New York State Court of Appeals, Dated February 7, 1985, Entered February 15, 1985 ..... 11a

Memorandum Decision of the New York State Court of Appeals Dated February 7, 1985 ..... 13a

Motion for Summary Judgment by Respondents 16a

Contents

Page

Motion for Extension of Time Within Which to Re-Argue and from Re-Argument to the New York State Court of Appeals 18a

Order of New York State Court of Appeals, Dated March 28, 1985, Granting Petitioner's Motion for Extension of Time and Denying Motion for Re-Argument 25a

Letter Dated August 2, 1983 by Petitioner to Justice Gammerman 27a

Motion to Extend Time to File Petition for Certiorari ... 29a

Order, Dated June 25, 1985, by Justice Thurgood Marshall, Granting Petitioner's Motion to Extend Time to File Petition for Certiorari 34a

Affidavit of Petitioner in Opposition to Respondent's Motion for Summary Judgment 35a

Relevant Statutory Provisions 38a

No.

In The

Supreme Court of the United States

October Term, 1985

LUIS FRANK UGARTE,

Petitioner,

vs.

UNITED STATES LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the State of New York, Court of Appeals (Appendix, *infra*, 13a-15a) is officially reported as 64 N.Y. 2d 836 (1985). The opinion of the Appellate Division, Supreme Court of New York (8a-9a) is officially reported as 105 A.D. 2d 606 (1984), 1985 AMC 1809.

JURISDICTION

This Court's jurisdiction is invoked under Section 1257(3) of Title 28, United States Code.

Petitioner brought suit in the Supreme Court of the State of New York pursuant to 46 U.S.C. § 688 and General Maritime Law. Respondents appealed the order of the Supreme Court, New York County, Special Term, Part I, entered on August 17, 1983 (1a) to the Appellate Division, First Department of the Supreme Court of the State of New York. The Appellate Division reversed the order of the Supreme Court, New York County, Special Term, Part I by order and decision dated November 8, 1984 (6a-9a). Petitioner appealed to the New York State Court of Appeals based upon the jurisdiction set forth in the Civil Practice Laws and Rules of the State of New York (C.P.L.R.) § 5601(a)(ii). Petitioner was unsuccessful in his appeal as evidenced by the order and decision dated February 7, 1985 and entered on February 15, 1985 (11a-15a).

A motion (1) for extension of the time within which to re-argue and (2) for re-argument to the New York State Court of Appeals was made by petitioner on March 14, 1985, in compliance with § 500.11(g) of the Court's Rules of Practice (18a-24a). By order dated March 28, 1985 (25a-26a), the Court of Appeals granted petitioner's motion for extension of time and denied the motion for re-argument.

Petitioner's appeal to this Court is based upon the decision of the New York State Court of Appeals affirming the decision of the Appellate Division, Supreme Court of the State of New York. Pursuant to 28 U.S.C. § 2101(c), petitioner had until June 26, 1985 or 90 days from the order denying rehearing, which was dated March 28, 1985 (25a-26a) to file a petition for certiorari. By motion to extend time to file a petition for certiorari, (29a-33a),

the petitioner requested additional time for which to file the instant petition. By order dated June 25, 1985, by Justice Thurgood Marshall (34a), petitioner's motion was granted and petitioner was given until July 26, 1985 to file the instant petition.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case are the Jones Act, 46 U.S.C. §688; Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §51; Admiralty Jurisdiction Act, 46 U.S.C. §740 and 28 U.S.C. §1257(3). These statutes may be found in their entirety in the Appendix, *infra* (38a-41a).

STATEMENT OF THE CASE

Petitioner Luis Frank Ugarte, a seaman, instituted this action pursuant to the Jones Act, 46 U.S.C. §688 and General Maritime Law, to recover damages from an injury allegedly caused by the negligence of respondent United States Lines, Inc., his employer and the owner of the ship upon which he worked or by respondent's agents as well as the unseaworthiness of respondent's vessel. The basic facts which are not in dispute are as follows:

Luis F. Ugarte was a member of the crew of respondent's vessel, the S.S. American Courier, from March 27 to May 24, 1978. On May 22, 1978, sometime before 6:00 p.m., the vessel docked at Bremerhaven, Germany, for the purpose of loading and unloading cargo. Perpendicular and adjacent to the vessel's gangway and level with the ground were a series of railroad tracks, along which passed railroad freight cars. The vessel's cargo was loaded and unloaded from these cars. On May 23, 1978, at about 6:30 p.m., petitioner left the vessel to go ashore on shore leave. Upon his return later that night, there was a line of railroad cars on the tracks parallel to the ship. There was no lighting in the narrow passageway between the ship and the railroad cars.

Petitioner walked in the area on the side of the railroad cars that was not adjacent to the ship until he arrived at a location opposite the gangway. When petitioner arrived opposite the gangway, he had to cross over the tracks by climbing over the coupling between two railroad cars without the benefit of any light. In doing so, petitioner slipped and suffered a fracture of his left leg. This suit was instituted in the Supreme Court of the State of New York, County of New York by petitioner.

Following the institution of the suit, respondent moved for summary judgment dismissing the complaint on the ground that under these facts it owed no duty to the petitioner under the Jones Act, 46 U.S.C. §688, *et seq.*, or the General Maritime Law. During the pendency of this motion, petitioner, by letter dated August 2, 1983 to Justice Gammerman of the Supreme Court of the State of New York (27a-28a), requested the opportunity to depose respondent in order to adduce additional evidence regarding control of the pier.

On August 11, 1983, Mr. Justice Gammerman denied respondent's motion for summary judgment, without ruling on petitioner's request, holding that petitioner may recover under the Jones Act, 46 U.S.C. §688, *et seq.*, since the decisions under that statute "could support a finding that defendant was negligent, under the circumstances herein, and because there are issues of fact respecting the adequacy of the lighting provided and notice to defendant . . . ."

Respondent, United States Lines, Inc., appealed to the Appellate Division of the Supreme Court of the State of New York for the First Department from the order and decision of Mr. Justice Ira Gammerman at Special Term, Part I, entered in the Office of the Clerk of the County of New York, on August 17, 1983 (1a-5a), arguing that the lower court had erroneously interpreted the law in denying respondent's motion for summary judgment.

The Appellate Division of the Supreme Court of the State of New York unanimously reversed on the law the order of Mr. Justice Gammerman, and granted respondent's motion for summary judgment, dismissing the complaint without costs (6a-9a). The Appellate Division concluded that a shipowner is not liable for unsafe conditions on the pier beyond the gangway when a seaman is on that pier as a result of shore leave.

Petitioner appealed to the Court of Appeals of the State of New York, on the ground that the Appellate Division, First Department, erroneously reversed the determination of the Special Term Justice. The issues which were raised on this appeal were (1) whether a shipowner's obligation under the Jones Act to furnish crew members with a safe place to work encompasses areas adjacent to the vessel which the seaman must traverse to get to and from his worksite; (2) whether a shipowner may be held liable for injuries to its seaman employee occasioned by the negligence of a pier owner or operator who was performing operational activities for the shipowner and (3) whether the placement of a gangway in an area inaccessible to crew members returning to the vessel by the presence of railroad cars and which causes injury to a crew member creates a condition of unseaworthiness.

The Court of Appeals affirmed the order of the Appellate Division with costs (11a-15a). The Court of Appeals concluded that petitioner had not raised a triable issue with respect to negligence on the part of respondent by virtue of his relationship with the pier owner. On the issue of whether the shipowner has an obligation to take measures on the ship to warn of conditions on the pier, and has an absolute duty to repair and warn of potentially hazardous conditions in the areas through which a seaman must pass in order to reach the ship, the court concluded that based upon the facts presented, neither contention has been shown to be an obligation imposed by General Maritime Law. While the court conceded that it has jurisdiction to entertain suits

brought under the Jones Act, it stated that it would exercise such jurisdiction with great deference to federal law and proceed cautiously.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW SHOULD BE REVIEWED BECAUSE IT ERRONEOUSLY INTERPRETS THE JONES ACT AS IT RELATED TO A SHIPOWNER'S NON-DELEGABLE DUTY TO FURNISH A SEAMAN WITH A SAFE PLACE IN WHICH TO WORK BEYOND THE GANGWAY.

In the following discussion petitioner will demonstrate that since a Jones Act employer is responsible for the negligence of its "agents", the failure of either the vessel owner directly or through its "agent" (the pier owner or operator) to provide safe means of ingress to the vessel, permits recovery of damages by petitioner. Petitioner will further demonstrate that the pier owner or operator was performing "operational activities" for the shipowner pursuant to contract and, therefore, was respondent's "agent" pursuant to this Court's decisions in *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326 (1958) and *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966).

It is currently well settled both under the Federal Employers' Liability Act (F.E.L.A.) and under the Jones Act, that an employer governed by those acts has a non-delegable duty to furnish its employees with a safe place in which to work "even when they are required to go onto the premises of a third party" over which the employer has no control, *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1 (1963). The court below was clearly requiring that petitioner show "control" of the pier on the part of respondent

(14a-15a). The Jones Act specifically incorporates the F.E.L.A. which holds railroads responsible in damages for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. §51.

In *Carter v. Union R.R.*, 438 F.2d 208, 211 (3rd Cir. 1971), the court held that the aformentioned duty includes a responsibility to inspect the third party's property for hazards, to take precautions to protect the employee from possible defects, and is separate and distinct from any negligence that may be attributable to "the third party." The decision in *Carter, supra,* comports with this Court's decision in *Shenker, supra,* in which it was held that the employer is charged with knowledge of the conditions prevailing in those areas upon which it expects that its employees will work in the performance of their duties.

Carter, supra, and *Kooker v. Pittsburgh & Lake Erie R.R.*, 258 F.2d 876 (6th Cir. 1958) clearly evince the principle that the employer's duty to provide a safe place to work encompasses property over which its employees must traverse in getting to and from work, even if this property is controlled by a third party. In both of these cases, liability was predicated solely on the railroad's actual or constructive knowledge of dangerous conditions on pathways over a third party's land which were used by the railroad's employees enroute to the worksite.

In *Carter,* Union Railroad contracted with General Motors Corp. to permit railroad employees to park on General Motors' property. Mr. Carter, a Union employee, used this parking area from which he had to walk along a dirt path to his workplace. The railroad exercised no control over the path which was maintained exclusively by its owner, General Motors. Carter, during inclement weather, fell and was injured, while navigating this path to report to work. This Court found that, for F.E.L.A.

purposes, Carter was in the course of his employment while walking on the path enroute to his workplace.

In *Kooker, supra,* the plaintiff drove his car to a vacant lot adjacent to the worksite. To get from the parking area to his employer's tracks, Mr. Kooker had to cross a path owned by another railroad. He fell due to ice and snow on this path. The Circuit Court reversed the trial court and held that the employer may be held liable for injuries incurred enroute to work on a third party's property over whom the employer had no control.

At the time of his accident, Mr. Ugarte was returning to his worksite, the vessel. Under the authority of the cases discussed heretofore, his employer can be held liable for placing the gangway in an area which made it hazardous for him to return to the vessel because of the railroad cars blocking his access to the gangway and because there was inadequate lighting, even though such areas were not under the direct control of the shipowner.

Shenker and its progeny cannot be distinguished from Mr. Ugarte's case on the ground that in *Shenker* the plaintiff was injured while performing work for his employer at the latter's direction, whereas here Mr. Ugarte was injured while returning from shore leave. The decisions in *Carter v. Union R.R., supra* and *Kooker v. Pittsburgh* and *Lake Erie R.R., supra,* demonstrate that *Shenker* is not to be so limited. These cases support the proposition that the duty to provide a safe place to work includes providing a safe means of getting to and from work in addition to providing safe facilities at work.

Any attempt to distinguish *Shenker* on the ground that petitioner here went ashore on his own business as opposed to ship's business must also fail because it ignores important maritime concepts. Admiralty law has long accepted shore leave as an essential part of a ship's operations, *Aguilar v. Standard Oil Co.*

of New Jersey, 318 U.S. 724, 733-4 (1944). *See also, Hamilton v. Marine Carriers Corp.,* 332 F.Supp. 223 (E.D. Pa. 1971), and *Chesapeake and Ohio Railway Co. v. Neuman,* 243 F.2d 804 (6th Cir. 1957).

It cannot be doubted that a seaman is in "the course of his employment" while getting on and off his ship to go on shore leave, *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943); *Marceau v. Great Lakes Transit Corp.,* 146 F.2d 416 (2d Cir. 1945), at least while he is in the confines of the area, which the shipowner knows he must traverse while leaving and returning to the vessel. While each case necessarily must depend on its own facts, we submit the guiding principle that the duty to provide a safe place in which to work includes those routes of ingress and egress to a vessel which the shipowner knows that the seaman *must* traverse in going to and from his vessel. Mr. Ugarte had to cross the tracks to return to his workplace and therefore was "in the course of his employment" while doing so.

In addition to a shipowner's non-delegable duty under the Jones Act to furnish a seaman with a safe place in which to work, other decisions of this Court, *Sinkler, supra,* pp. 330-1; *Hopson v. Texaco, Inc.,* 383 U.S. 262 (1966), establish that the shipowner may be liable for the negligence of the pier owner or operator with whom it has a contract if such act or omission causes injury to vessel personnel.

Since the respondent's vessel had in this case been at the pier for more than twenty-four hours loading and unloading cargo, it must be assumed that the owner or operator of the pier had been engaged by the respondent to provide berthing facilities for the vessel. A contrary assumption would presume theft of services.

The foregoing facts, petitioner asserts, require the conclusion that the pier owner or operator was performing "operational

activities" for the shipowner and, therefore, was respondent's "agent" within the meaning of that term as used in the Jones Act, 46 U.S.C. §688, and the Federal Employers' Liability Act, 46 U.S.C. §51. These Acts hold employers responsible in damages for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ."

The leading case on the scope of the term "agent", as used in the Federal Employers' Liability Act (F.E.L.A.) and the Jones Act which incorporated the F.E.L.A. is *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958). There, the plaintiff, a railroad worker, was injured as the result of the negligence of another railroad which was performing, under contract, switching operations for plaintiff's employer. Under common law principles, this second railroad would have been regarded as an "independent contractor" for whose actions the plaintiff's employer was not responsible. Notwithstanding this "independent contractor" status, this Court held that the railroad doing the switching was the "agent" of the plaintiff's employer for purposes of F.E.L.A. This Court reasoned, further, that if the remedial purposes of the statute were to be accomplished, then an "accomodating scope" must be given to the word "agent". *Sinkler, supra,* pp. 330-1. This Court concluded that the test of "agency" was whether the third party was "performing, under contract, operational activities" of the carrier. *Sinkler,* pp. 331-2.

In *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966), the *Sinkler* doctrine was applied to a Jones Act suit under circumstances which were far more extreme than those of the instant case (*i.e.*, the occurrence giving rise to liability took place miles from the ship). In *Hopson,* seamen were injured in an automobile accident while they were passengers in a taxicab taking them to the United States Consul in a foreign port. The taxicab operator was found to be engaged in an "operational activity" of the shipowner and,

therefore, was the shipowner's "agent" within the meaning of the Jones Act.

The *Sinkler* doctrine was applied by the Third Circuit in *Carney v. Pittsburgh and Lake Erie R.R.*, 316 F.2d 277 (3rd Cir. 1963), in which the plaintiff, a resident of Pittsburgh, was requested by his railroad employer to work in Ohio. The railroad agreed to pay his living expenses while he was in Ohio, provided that he stay at the local Y.M.C.A. He was injured while asleep in the Y.M.C.A., miles distant from the railroad property, when he fell from a defectively maintained bed. In affirming a judgment for the plaintiff against the railroad, the Third Circuit held that the Y.M.C.A. was performing an "operational activity" for the railroad, and therefore was its "agent" within the meaning of the Federal Employers' Liability Act. In the case of *Hamilton v. Marine Carriers Corporation*, 332 F.Supp. 223 (E.D. Pa. 1971), Judge Masterson of the Eastern District of Pennsylvania held that providing a safe means of ingress and egress to a vessel was an "operational activity" of the shipowner under the *Sinkler* doctrine and concluded in circumstances remarkably similar to the case at bar, that a seaman injured because of a defective condition of a pier over which he was required to walk to reach his vessel, could recover against the shipowner under the Jones Act.

The court below erroneously interpreted the rules evidenced in *Sinkler* and *Hopson,* by requiring that petitioner offer sufficient evidentiary proof to establish that the respondent had control of the area in question. The mere fact that the S.S. American Courier docked at Bremerhaven, Germany, for the purpose of loading and unloading cargo, should have been, in and of itself, sufficient to establish that respondent had control over the area in question, even absent evidence of an express contractual arrangement.

The reasoning of *Sinkler* and *Hopson* dictate that the pier operator and/or the railroad were "agents" of the American

Courier for whose negligence the shipowner may be held liable. The phrase "operational activity" means an activity necessary for the operation of the ship's business (*Hopson, supra,* at 330). Here, in addition to providing a means of boarding the vessel, the pier provided the berth for the vessel and the railroad provided the cars to load and unload the cargo. It is manifest that a contract to perform these tasks existed. A contrary conclusion would mean that the vessel stole these services. Both the berth and the movement of its cargo are vital to the operations of the American Courier. Therefore, the negligence of either the pier operator or the railroad which caused injury to Mr. Ugarte renders the shipowner liable.

II.

THE DECISION OF THE COURT BELOW SHOULD BE REVIEWED BECAUSE IT FAILED TO RECOGNIZE THAT THE WARRANTY OF SEAWORTHINESS OWED BY THE SHIPOWNER TO ITS SEAMEN TO PROVIDE A SAFE MEANS OF INGRESS AND EGRESS EXTENDS BEYOND THE GANGWAY.

Recent appellate court, as well as lower court decisions, *Toddy v. Arkansas Valley Dredging Co.*, 470 F. Supp. 692 (1979); *Romero Reyes v. Marine Enterprises, Inc.*, 494 F. 2d 866 (1st Cir. 1974); *Kearney v. Savannah Foods & Indus., Inc.*, 350 F. Supp. 85 (S.D. Ga. 1972), have held that the warranty of seaworthiness owed by the shipowner to its seamen to provide a safe means of ingress and egress extends beyond the gangway. This recurring and most important issue has not yet been addressed by this Court.

The facts upon which petitioner's case is based are strikingly similar to the above-mentioned decisions which extended the shipowner's warranty of seaworthiness beyond the gangway. It

is timely that this Court address this issue of far-reaching and recurring importance and review the decision made below.

In *Toddy v. Arkansas Valley Dredging Co.*, 470 F. Supp. 692 (1979), the United States District Court, Eastern District of Arkansas, held that the conduct of a shipowner in picking up a seaman at a steep and slippery bank at which no steps or guardrails were provided, with a boat that lacked any means of ingress and egress clearly created a breach of the warranty of seaworthiness. According to the District Court, "The crucial point is that no safe means of getting from the bank into the boat was provided. This failure was a breach of the warranty of seaworthiness owed by the shipowner to its seamen."

In the case at bar, petitioner discovered, while crossing the pier in order to return to his vessel, that the only means for him to reach the gangway was to climb between two railroad cars over a platform which was slippery from rain or walk down a dark and narrow area along the edge of the pier. Therefore no safe means of egress or ingress were provided for Mr. Ugarte to return to his vessel.

In *Romero Reyes v. Marine Enterprises, Inc.*, 494 F.2d 866 (1st Cir. 1974), the United States Court of Appeals addressed the issue of whether the seaworthiness warranty should be limited to gear "owned" by the shipowner as part of "equipment appurtenant" to the vessel. Reyes was injured when he slipped and fell from a defective and poorly lit gangway not belonging to the shipowner. The court determined that the apparatus from which plaintiff fell was the regular means of boarding and leaving the vessel. The seaworthiness warranty is not, however, limited to gear "owned" by the shipowner and while the phrase "equipment appurtenant" to the vessel suggests equipment "belonging" physically to the vessel, it may, and in this case does, include equipment *vital to the vessel's mission.*

The pier upon which Mr. Ugarte fell was a primary means by which cargo was loaded and unloaded from respondent's vessel, as well as being the only means of getting to and from the vessel. Thus, the pier functioned as an instrumentality of the vessel. In light of the First Circuit's holding in *Reyes,* the access route across the pier, while not physically belonging to the vessel, was the only means of boarding and leaving the vessel and therefore vital to the vessel's mission, Therefore, the warranty of seaworthiness should apply.

In *Kearney v. Savannah Foods & Indus., Inc.,* 350 F. Supp. 85 (S.D. Ga. 1972) it was held that the warranty of seaworthiness attaches to a catwalk permanently affixed to a pier because it "was an integral part of the equipment used in getting on and off" the ship.

The above issue of whether a shipowner owes a duty of 'seaworthiness to a seaman beyond the end of the gangway is one of great importance and recurring frequency.In view of the fact that various appellate and lower court decisions have addressed this very issue, it appears most timely that this Court address this issue in order to provide some authority to the various lower courts that are tackling this very arduous issue.

III.

THE DECISION BELOW SHOULD BE REVIEWED BECAUSE THE COURT OF APPEALS OF THE STATE OF NEW YORK ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BY FINDING THAT PETITIONER DID NOT ADDUCE SUFFICIENT EVIDENCE TO SUPPORT ITS CAUSE OF ACTION AND BY HOLDING THAT THE FACTS PRESENTED BY PETITIONER WERE INSUFFICIENT TO STATE A CAUSE OF ACTION.

The Court of Appeals of the State of New York erroneously granted respondent's motion for summary judgment by concluding that petitioner did not adduce sufficient evidence to support its cause of action. The opinion below is in error for a number of reasons: (1) respondent's motion for summary judgment was grounded upon respondent's allegation that as a matter of law it owed no duty to petitioner under the Jones Act or General Maritime Law based on the fact that the accident happened on the pier while plaintiff was returning from shore leave and not based upon petitioner's failure to present facts sufficient to state a cause of action; (2) respondent's papers in support of their motion for summary judgment were defective, since no affidavit by the party itself was submitted; (3) while this instant motion was *sub judice* before the Supreme Court of the State of New York, petitioner asked the court to reserve decision until Petitioner deposed respondent on the issue of control of the pier. The motion was decided without affording petitioner such opportunity; (4) various facts were alleged by petitioner in his opposition papers to respondent's motion which were never refuted by respondent and which, if brought within the perview of a jury, might establish respondent's liability under the Jones Act and/or General Maritime Law.

Respondent's motion for summary judgment (16a-17a) was grounded upon respondent's allegation that as a matter of law they owed no duty to the petitioner under the Jones Act or General Maritime Law since his accident happened on the pier while petitioner was returning from shore leave. Basically, respondent was arguing that there could be no facts that would give rise to liability when the accident happens on the pier. Respondent failed to adduce any facts at all regarding the incident during which petitioner was injured at Bremerhaven, Germany, on May 24, 1978, since the motion for summary judgment is supported only by affidavit of respondent's attorney and not by United States Lines, a party who would have had first hand knowledge of the incident. Petitioner did allege by affidavit (35a-37a) that he had no safe access to the gangway, that the pier was insufficiently lit, and that the pier owner was an agent of the respondent. These facts made upon information and belief by petitioner, were not refuted at all by respondent, United States Lines and therefore should have been taken as being true.

Of additional importance is the letter dated August 2, 1983 (27a-28a) to Hon. Ira Gammerman while the motion was pending to defer decision on the motion until petitioner could depose respondent on the issue of control of the pier. The motion was decided, however, before petitioner had the opportunity to depose respondent on this issue.

Respondent's motion for summary judgment was improperly denied since issues of fact concerning the negligence of respondent, United States Lines, Inc. may be shown to exist which would require resolution by a jury. In *Gutierrez v. Waterman Steamship Co.*, 373 U. S. 206 (1963), this Court held that a vessel owner may be liable for acts occurring aboard the vessel which have ramifications ashore. There, a cargo of beans being unloaded spilled out of broken bags and Gutierrez, a longshoreman, slipped on some loose beans on the dock. The shipowner's negligence

consisted of allowing the unloading of defectively bagged cargo. This Court held that if the shipowner's negligence occurred aboard the vessel, the fact that the impact of such negligence is felt ashore is of no moment. The Admiralty Jurisdiction Act, 46 U.S.C. §740, made vessels on navigable waters liable for damage or injury "notwithstanding that such damage or injury be done or consummated on land." This status is not limited to injuries caused by the physical agency of the vessel itself, *i.e.*, the vessel rams a rock.

In this case, Mr. Justice Gammerman, in his memorandum decision (2a-5a), hypothesized that the shipowner might be held negligent if Mr. Ugarte was injured due to the failure of respondent to rig lighting from the vessel to illuminate a safe path to the gangway. This hypothesis is in accord with *Gutierrez*, *i.e.*, the shipowner may be liable for its negligence in failing to provide lighting regardless of the fact that the impact of that failure caused injury ashore.

Liability might also be imposed upon respondent if the facts demonstrate that the railroad cars, whose positioning caused Mr. Ugarte's injuries, were negligently placed at the direction or with the consent of the shipowner. Recovery by petitioner would also be allowed if respondent owned or leased the pier at which the vessel was docked on the date of the accident or if respondent contracted to provide its seamen with safe access to the vessel.

Also, it would be for a jury to decide whether the ship's officers should have warned crewmembers that their path to the gangway would be blocked when they returned to the vessel.

Based solely upon the facts presented in petitioner's affidavit, the court below could *not* have been certain that under no set of facts petitioner would be entitled to recover. Not only did the granting of respondent's motion for summary judgment deny

petitioner the opportunity of having a jury decide the issues of lighting, access to the pier, and agency on the part of the pier owner, but pursuant to the Admiralty Jurisdiction Act, 46 U.S.C. §740 (40a), it also deprived a jury of determining whether any negligent acts were performed on the vessel, as evinced by *Gutierrez*.

It is important to note that this Court should grant review to the decision below regardless of whether or not the facts which petitioner did present to the Supreme Court of the State of New York were sufficient to state a cause of action and defeat a motion for summary judgment. The major issue presented in the instant petition for certiorari is whether the petitioner has sufficient grounds to impose liability upon respondent based upon the Jones Act and General Maritime Law. This Court has been cloaked with the ultimate authority to review final judgments rendered by the highest court of a state by writ of certiorari where a federal statute is drawn in question by 28 U.S.C. §1257(3). It is therefore proper and most necessary in this instant matter, that this Court review the decision below and interpret the Jones Act and General Maritime Law in order that petitioner be afforded the relief that he so rightly deserves.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE J. CAPPIELLO, JR.

PHILLIPS & CAPPIELLO, P.C.
Attorneys for Petitioner

ORDER OF SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, PART I, ENTERED AUGUST 17, 1983

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM, PART I
NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street, New York, New York 10007

Present: Hon. IRA GAMMERMAN

Justice

Luis Frank Ugarte

-against-

United States Lines

The following papers numbered 1 to read on this motion SUBMITTED

No. 91 on Calendar of Mar 8 1983	Papers Numbered
Notice of Motion—Order to Show Cause—and Affidavits Annexed	1-2
Answering Affidavit	3

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Dated 8/11/83

Briefs: Plaintiff's X Defendant's X

County Clerk's No. 6143, 1979
Spec I Liber 06 Line 1, 1983

MEMORANDUM DECISION OF JUSTICE GAMMERMAN, SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, PART I

SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL TERM : PART 1

Index No. 06143/79

#91 of 3/8/83

LUIS FRANK UGARTE,

Plaintiff,

- against -

UNITED STATES LINES, INC.,

Defendant.

GAMMERMAN, J.:

Plaintiff, a seaman, instituted this action pursuant to the Jones Act (46 U.S.C. §688) to recover damages from an injury allegedly caused by the negligence of defendant (his employer-shipowner) or by defendant's agents. Defendant moves for summary judgment dismissing the complaint.

Plaintiff claims the following:

On May 23, 1978, between 6:30 and 7:00 P.M., plaintiff left defendant's ship which was docked at a pier in Bremerhaven, Germany, to go on shore leave. When he returned at approximately 10:00 P.M., railroad cars (presumably spotted earlier for the

purpose of loading and unloading cargo) blocked the entrance to the gangway so that the narrow, unlit path between the cars and the water edge of the pier was, in his opinion, "unsafe". Plaintiff therefore used a route, on the other side of the railroad cars, which, because it was "better" lit, posed "no danger of falling into the water." In order to reach the gangway, it became necessary for plaintiff to climb between two railroad cars, over a platform which was wet and slippery from rain. Plaintiff fell from the platform, fracturing his left leg in several places.

For the purposes of this motion, the court will consider plaintiff's version of the accident, contained in his affidavit, as accurate and will view the allegations in a light most favorable to him. (See, *Weiss v. Garfield*, 21 AD2d 156, 158). So construing the plaintiff's allegations, it can be concluded that there was no safe means of access to the gangway (one route being narrow, unlit and at the water edge of the pier, while the other route necessitated a climb over a slippery loading platform). In addition, the proximity to the ship of these unsafe conditions, and the unlikelihood that they came into existence only immediately prior to the accident may be the basis of an inference of notice to defendant.

Defendant initially contends that the Jones Act decisions which govern this action uniformly hold that a shipowner owes no duty to seamen on shore leave to provide a safe means of access to the ship beyond the pier end of the gangway. However, none of the cases relied on by defendant involved circumstances in which there was no safe means of access to the gangway. On the contrary, those decisions indicate that, under such circumstances, the shipowner's duty may extend beyond the gangway and impose liability for dangerous conditions of which the defendant had notice.

Memorandum Decision of Justice Gammerman

In *Paul v. United States,* 205 F2d 38, 40 (3rd Cir. 1953), the Court of Appeals distinguished that action from a case (*Patrick v. Atlas Knitting Co.*, 164 AD 753) which imposed liability on an employer because "the *only* means of egress from the employer's premises was over the railroad tracks [frequently used by] 'the swiftest trains in the world' . . ." (emphasis in original). Here, as in *Patrick,* the *only* means of access to the ship was over a hazardous course. (Accepting, of course, plaintiff's version of the facts.)

In *Wheeler v. West India S.S.Co.,* 103 F. Supp. 631, 634 (S.D.N.Y. 1951), *aff'd* 205 F2d 354 (2nd Cir), *cert. den.* 346 U.S. 889 (1953), the District Court stated that:

> Defendant was not under an absolute duty to provide the plaintiff with a safe means of going ashore and returning to his ship beyond the ship's gangplank. A duty merely to use due diligence to provide reasonably safe means of egress and access beyond the gangplank would not serve the plaintiff [who was injured by the unforeseeable operation of a locomotive].

In *Quam v. Mobil Oil Corp.*, 496 F. Supp. 986, 989 (S.D.N.Y. 1978), *aff'd* 599 F2d 42 (2nd Cir.), *cert. den.* 444 U.S. 950 (1979), the District Court likewise noted that "even if the [shipowner's] duty . . . extended on to the dock" there was insufficient evidence that the seaman fell from the dock. Thus, in *Quam* and in *Wheeler*, the defendants could not have been liable even if their duties extended beyond the gangway.

In *Dangovich v. Isthmian Lines, Inc.*, 218 F. Supp. 235 (S.D.N.Y. 1963), *aff'd* 327 F2d 355, 356 (2nd Cir. 1964), the Court

of Appeals noted that the plaintiff "was apparently aware that at least one other road led away from the dock . . ." Similarly, in *Bates v. Prudential-Grace Lines, Inc.*, 375 F. Supp. 774, 776-777 n. 7 (W.D. Wash. 1972), *aff'd* 497 F2d 900 (9th Cir.), *cert. den.* 419 U.S. 1009 (1974), the District Court noted that the hole into which the plaintiff had hurriedly stepped "was clearly visible to anyone who was observing the path he was walking." Thus, the plaintiffs in those cases could have easily avoided their injuries.

Finally, in *Cotto v. Moore-McCormack Lines, Inc.*, 1975 AMC 59, 60 (S.D.N.Y. 1970), the District Court held that absent "any contention that the defendant had any control or notice of the defective door on the pier, defendant is not liable". The rationale that defendant lacked control over areas beyond the gangway is not persuasive here, since defendant may have been able to provide supplemental lighting from the ship.

Since the Jones Act decisions could support a finding that the defendant was negligent, under the circumstances here, and because there are issues of fact respecting the adequacy of the lighting provided and notice to defendant, defendant's motion for summary judgment must be denied.

The foregoing constitutes the decision and order of the court.

Dated: August 11, 1983

IG
J.S.C.

FILED
AUG 17 1983
CO. CLERK'S OFFICE
NEW YORK

ORDER OF THE APPELLATE DIVISION FIRST DEPARTMENT SUPREME COURT OF THE STATE OF NEW YORK, DATED NOVEMBER 8, 1984

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 8, 1984

Present—Hon. Francis T. Murphy, Presiding Justice
David Ross
John Carro
E. Leo Milonas
Fritz W. Alexander, II, Justices

20861

Luis Frank Ugarte,

Plaintiff-Respondent,

-against-

United States Lines, Inc.,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County (Ira Gammerman, J.), entered on August 17, 1983, which denied defendant's motion for summary judgment, and said appeal having been argued by R. Alexander Hulten of counsel for the appellant, and by Edward M. Katz of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein;

Order of Appellate Division

It is unanimously ordered that order so appealed from be and the same is hereby reversed, on the law, the motion is granted and the complaint is dismissed, without costs and without disbursements. The clerk is directed to enter judgment in favor of defendant-appellant, dismissing plaintiff-respondent's complaint as against defendant-appellant, without costs.

ENTER:

JOSEPH J. LUCCHI
Clerk

MEMORANDUM DECISION OF THE APPELLATE DIVISION FIRST DEPARTMENT SUPREME COURT OF THE STATE OF NEW YORK, DATED NOVEMBER 8, 1984

Murphy, P.J., Ross, Carro, Milonas, Alexander, JJ.

20861

Luis Frank Ugarte,
Plaintiff-Respondent, E.M. Katz

-against-

United States Lines, Inc.,
Defendant-Appellant. R.A. Hulten

Order, Supreme Court, New York County (Ira Gammerman, J.), entered August 17, 1983, which denied defendant's motion for summary judgment, is unanimously reversed, on the law, motion is granted and the complaint is dismissed, without costs.

On May 23, 1978, the defendant's ship, the S.S. American Courier (Courier), was docked at a pier in Bremerhaven, Germany. Plaintiff was a member of the Courier's crew, and early in the evening of May 23rd, plaintiff left the ship for several hours of shore leave. At about 10:00 P.M., plaintiff returned to that part of the pier where the Courier was docked. Plaintiff found that a number of railroad boxcars, which are used to load and unload cargo, were on the pier. In order to reach the Courier's gangway, plaintiff decided to climb between two boxcars and over a platform, which was wet and slippery as a result of rainfall. As he was doing this, plaintiff slipped and fell off the platform and fractured his left leg.

Since the plaintiff was a merchant seaman, he commenced this negligence action, pursuant to the federal Jones Act (46

U.S.C.A. section 688), against the employer-shipowner defendant to recover damages for his injuries. After deposing plaintiff, defendant moved for summary judgment. Special Term denied that motion. We find that Special Term erred.

Although this maritime action was brought by the plaintiff in a New York Court, "it is the general maritime law that governs the rights and liabilities of the parties" (*Alvez v. American Export,* 46 NY 2d 634, 638). The general rule in federal maritime Law is that a shipowner is not liable for unsafe conditions on the pier beyond the gangway, when a seaman is on that pier, as a result of shore leave, and not in the performance of his duties (*Wheeler v. West India S.S. Co., 205 F 2d 354 (2nd Cir.); Dangovich v. Isthmian Lines, Inc.,* 327 F 2d 355 (2nd Cir.); *Paul v. United States,* 205 F 2d 38 (3rd Cir.), *cert. den.* 346 U.S. 888; and, *Bates v. Prudential-Grace Lines, Inc.,* 497 F.2d 960 (9th Cir.) cert. den. 419 U.S. 1009). We apply that rule (*Alvez v. American Export,* cited *supra,* at 639). Thus, we conclude that defendant is not liable, as a matter of law, for the injuries suffered by plaintiff.

Order filed.

NOTICE OF APPEAL TO NEW YORK STATE COURT OF APPEALS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index # 06143/79

LUIS FRANK UGARTE,

Plaintiff,

-against-

UNITED STATES LINES, INC.

Defendant

PLEASE TAKE NOTICE that plaintiff, Luis Frank Ugarte hereby appeals to the Court of Appeals from the order in this action of the Appellate Division of the Supreme Court in and for the First Judicial Department in the County of New York filed and entered in the office of the County Clerk on November 8, 1984, which reversed on the law a determination of the Supreme Court, New York County and thereby dismissed the complaint and from each and every part of the order.

Dated: New York, New York
November 15, 1984

Yours, etc.

PHILLIPS & CAPPIELLO, P.C.

By Edward M. Katz
Attorneys for Plaintiff
346 West 17th Street
New York, New York 10011
(212) 929-8410

TO: Kirlin, Campbell & Keating
120 Broadway
New York, New York 10004

ORDER OF THE NEW YORK STATE COURT OF APPEALS, DATED FEBRUARY 7, 1985, ENTERED FEBRUARY 15, 1985

Remittur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 195

Luis Frank Ugarte,

Appellant,

v.

United States Lines, Inc.,

Respondent.

The appellant(s) in the above entitled appeal appeared by Phillips & Cappiello, P.C., the respondent(s) appeared by Kirlin, Campbell & Keating, Esqs.

The Court, after due deliberation, orders and adjudged that on review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Jasen, Meyer, Simons and Kaye concur. Judge Alexander took no part.

The Court further orders that this record on the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

Order of New York State Court of Appeals

I certify that the preceding contains a correct record on the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 7, 1985.

MEMORANDUM DECISION OF THE NEW YORK STATE COURT OF APPEALS DATED FEBRUARY 7, 1985

STATE OF NEW YORK

COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

1 No. 195
Luis Frank Ugarte,

Appellant,

v.

United States Lines, Inc.,

Respondent.

(SSM 2) Edward M. Katz, NY City, for appellant
R. Alexander Hulten, NY City, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

Plaintiff, a seaman employed by defendant-shipowner, went ashore on leave for a few hours during the evening of May 23, 1978, when the ship was docked for loading and unloading cargo in Bremerhaven, West Germany. On his return to the ship, he found that several railroad boxcars located on tracks near the ship impeded his access to the gangway. Plaintiff determined that

the pathway between the boxcars and the edge of the pier was too dangerous for passage, and instead climbed between two of the boxcars and over a platform or coupling, which was wet from rain. In so doing, he slipped and fell, fracturing his leg. Plaintiff commenced this lawsuit under the Jones Act, alleging that the shipowner was negligent in failing to correct or warn of a hazardous condition on the pier. At the close of discovery, defendant moved for summary judgment. Special Term denied the motion, but the Appellate Division unanimously reversed and dismissed the complaint.

While an injury might occur in the course of employment within the meaning of the Jones Act even when it does not actually take place aboard ship (see *Braen v. Pfeifer Oil Trans. Co.* 361 US 129, 132-133; *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 US 36), and even when the injured seaman is on shore leave at the time of the accident (see *Aguilar v. Standard Oil Co.*, 318 US 724, 733-734; *Marceau v. Great Lakes Transit Corp.*, 146 F2d 416, cert denied 324 US 872), here plaintiff has not raised a triable issue with respect to negligence on the part of defendant or any of its officers, employees or agents (see *De Zon v. American President Lines Ltd.*, 318 US 660, 671-672; *Quam v. Mobil Oil Corp.*, 496 F Supp 986, affd 599 F2d 42, cert denied 444 US 950). Even if the duty of a shipowner to correct, or warn its employees of, an unsafe condition beyond the pier-end of the gangway attaches where the shipowner possesses some ownership interest in the pier or the pier owner acts as the shipowner's agent by performing operational activities (see *Hopson v. Texaco, Inc.*, 383 US 262; *Sinkler v. Missouri Pacific R.R. Co.*, 356 US 326, 331-332; see, also, 1B Hall-Saun-Bellman, Benedict on Admiralty [7th rev ed], § 29, pp 3-200 to 3-201), plaintiff has failed to adduce evidentiary proof in admissible form to sustain his conclusionary assertion that defendant had control of the area in question by

virtue of its relationship with the pier owner. Defendant's summary judgment motion was therefore properly granted (see *Zuckerman v. City of New York*, 49 NY2d 557, 562; *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068).

Plaintiff argues, alternatively, that the shipowner has an obligation to take measures on the ship to warn of conditions on the pier, and that the shipowner has an absolute duty to repair and warn of potentially hazardous conditions in areas through which a seaman must pass in order to reach the ship. On the facts presented, neither contention has been shown to be an obligation imposed by general maritime law. Although we have jurisdiction to entertain suits brought under the Jones Act, we exercise such jurisdiction with great deference to federal maritime law, and proceed cautiously, "cognizant that it is the general maritime law that governs the rights and liabilities of the parties" (*Alvez v. American Export Lines, Inc.*, 46 NY2d 634, 638, affd 446 US 274).

* * * * * * * *

On review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs, in a memorandum. Chief Judge Wachtler and Judges Jason, Meyer, Simons and Kaye concur. Judge Alexander took no part.

Decided February 7, 1985

MOTION FOR SUMMARY JUDGMENT BY RESPONDENTS

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index #: 06143/79

LUIS FRANK UGARTE,

Plaintiff,

-against

UNITED STATES LINES, INC.,

Defendant.

S I R S :

PLEASE TAKE NOTICE, that defendant, UNITED STATES LINES, INC., by its attorneys, KIRLIN, CAMPBELL & KEATING, upon the annexed Affirmation of R. ALEXANDER HULTEN, dated February 3d, 1983, and all of the prior pleadings and proceedings heretofore had herein, will move this Honorable Court, at Special Term, Part I at the Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York at 9:30 A.M. on February 18th, 1983, or as soon thereafter as counsel can be heard for an Order granting Defendant's motion for summary judgment and dismissing the complaint because it owes no duty to the plaintiff under the Jones Act or the General Maritime law.

Motion for Summary Judgment

PLEASE TAKE FURTHER NOTICE, that opposing papers, if any, must be served on the undersigned no later than five (5) days prior to the return date of this motion.

Dated: New York, New York
February 3, 1983

Yours, etc.,

KIRLIN, CAMPBELL &
KEATING
Attorneys for Defendant
Office and P.O. Address
120 Broadway
New York, N.Y. 10271
Tel. No.: (212) 732-5520

TO: PHILLIPS & CAPPIELLO, P.C.
Attorneys for Plaintiff
Office and P.O. Address
346 West 17th Street
New York, New York 10011

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO RE-ARGUE AND FROM RE-ARGUMENT TO THE NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEAL

Appeal #195

LUIS FRANK UGARTE,

Plaintiff-Appellant

-against-

UNITED STATES LINES, INC.

Defendant-Appellee

Index to Motion to Reargue

	Page
Notice of Motion to Reargue	1-2
Memorandum in Support of Motion to Reargue	3-6
Preliminary Statement	3
Argument	4-6
Conclusion	7

Motion for Extension of Time

STATE OF NEW YORK
COURT OF APPEAL

Appeal #195

LUIS FRANK UGARTE,

Plaintiff-Appellant,

-against-

UNITED STATES LINES, INC.

Defendant-Appellee

Notice of Motion to Reargue

To: R. A. Hulten, Esq.
Kirlin, Campbell & Keating
120 Broadway
New York, New York 10005

PLEASE TAKE NOTICE that upon the Memorandum Opinion of this Court dated February 7, 1985, a letter to Honorable Ira Gammerman dated August 2, 1983 and a Notice to Take Deposition Upon Oral Examination dated August 2, 1983, the undersigned will move this Court at the Court of Appeals Hall, Albany, New York on the 25th day of March, 1985 for reargument and reconsideration of the Court's decision of February 7, 1985 on the grounds that:

1. Contrary to the Court's assertion that plaintiff failed to adduce proof that defendant had control of the area in question,

by virtue of its relationship with the pier owner, plaintiff did allege such control and such allegation was not denied by defendant;

2. While the defendant's motion for summary judgment was *sub judice* before Mr. Justrice Gammerman, plaintiff informed the Court that he possessed information that defendant had to maintain the area in which the accident occurred; proposed to depose defendant on this issue; and requested deferral of the Court's decision on the motion until after defendant had been deposed.

Yours etc,

PHILLIPS & CAPPIELLO, P.C.

By /s/ Edward M. Katz
Edward M. Katz
346 W 17th St
New York, New York 10011

Dated: New York, New York
March 14, 1985

Motion for Extension of Time

STATE OF NEW YORK
COURT OF APPEAL

Appeal #195

LUIS FRANK UGARTE,

Plaintiff-Appellant,

-against-

UNITED STATES LINES, INC.

Defendant-Appellee

MEMORANDUM IN SUPPORT OF MOTION TO REARGUE

PRELIMINARY STATEMENT

The appeal in this case was heard on a summary procedure pursuant to Section 500.4 of the Rules of this Court. The undersigned erroneously assumed that the informal procedure provided by that Section including the submission of only one copy of a letter brief would apply to requests for reargument of this Court's decision. Therefore, plaintiff's request for reargument was sent to the Clerk of this Court on March 7, 1985, within thirty (30) days of the date of decision on the Appeal in the form of a letter rather that a formal motion. This letter request for reargument was returned by the Court by letter dated March 8 but received March 13 since it did not conform to the Court's rules. Plaintiff respectfully requests that the Court accept this motion although it was not properly served within the usual thirty day period provided in Section 500.4(g)(3).

Motion for Extension of Time

ARGUMENT

In its Memorandum Opinion dated February 7, 1985 the Court stated that "Plaintiff has failed to adduce evidentary proof in admissible form to sustain his conclusory assertion that Defendant had control of the area in question by virtue of its relationship with the pier owner."

Plaintiff-appellant respectfully points out that defendant-appellee in its original moving papers did not submit any affidavit of fact concerning the operation and control of the pier in question, but rather simply submitted an affirmation in support of its motion from F. Alexander Hulten, defendant-appellee's attorney. That affirmation made no reference to operation and control of the pier, but rather simply addressed the legal issue of whether the shipowner's obligation extended beyond the gangway. (See Record on Appeal P. 13) Mr. Hulten's affidavit should not have been given any probative value. *South Bay Center, Inc. v. Butler, Henrich & Marshall,* 43 Misc. 2d 269, 250 NYS 2d 863 (S. Ct. Nassau County 1964).

Plaintiff-appellant in its opposing papers submitted the affidavit of plaintiff along with a memorandum of law. (Record on Appeal P.37). In addition to reciting the facts of the accident, plaintiff alleged that the pier owner or operator was an agent of United States Lines, Inc. Therefore, for purpose of a summary judgment motion, such a statement by the plaintiff should be treated as a fact, and the motion for summary judgment denied. *Kuehne & Nagel, Inc. v. Baiden,* 36 NY 2d 539, 369 NYS 2d 667, 330 N.E. 2d 624 (1975).

The motion for summary judgment was made at the close of discovery. By granting defendant-appellee's motion for

summary judgment, the Court would be requiring any litigant to adduce all evidentiary proof in admissible form during the discovery process. In this case, plaintiff-appellant intended to obtain and introduce admissible evidence when and if the shipowner created an issue of fact by denying it operated or controlled the pier. In the within motion, the shipowner never denied operating the pier, either directly or through an agent.

It must also be pointed out that, while defendant's motion for summary judgment was "*sub judice*" before Mr. Justice Gammerman of the Supreme Court, New York County, plaintiff informed the Court that he possessed information that United States Lines, Inc. was charged with maintenance of the German pier upon which the accident occurred and requested that decision on the motion be deferred until a deposition of defendant could be had on this subject. A copy of plaintiff's letter to Judge Gammerman and a copy of the Notice of Deposition to defendant is appended hereto. Judge Gammerman did not rule upon this request; rather he denied defendant's motion for summary judgment. Defendant has never produced any one for purposes of deposition on this question. Pursuant to CPLR 3212 (f), the court can make an appropriate order to give plaintiff an opportunity to get the additional evidence.

Plaintiff-appellant's basic position was and is that as a matter of law, a ship owner may be liable for a dangerous condition existing on a pier even if it does not have control of the pier either directly or through an agent. In the alternative, in an instance where the plaintiff alleges in its affidavit that the pier owner or operator was an agent of the defendant, and the defendant does not deny same, at the very least a question of fact is introduced which should be the basis for a denial of the motion.

Motion for Extension of Time

CONCLUSION

Based on the above, we respectfully request the Court to reconsider its decision and to remand the action to the Supreme Court so that evidence can be developed on the question of operation and control of the pier.

Respectfully submited,

PHILLIPS & CAPPIELLO, P.C.

BY /s/ Edward M. Katz
Edward M. Katz

Dated: New York, New York
March 14, 1985

ORDER OF NEW YORK STATE COURT OF APPEALS, DATED MARCH 28, 1985, GRANTING PETITIONER'S MOTION FOR EXTENSION OF TIME AND DENYING MOTION FOR RE-ARGUMENT

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of March A.D. 1985

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 310

Luis Frank Ugarte,

Appellant,

vs.

United States Lines, Inc.,

Respondent.

A motion having heretofore been made herein upon the part of the appellant (1) for an extension of the time within which to move for reargument and (2) for reargument of the above cause, papers having been submitted on the motion and due deliberation having been thereupon had, it is

ORDERED, that the said motion for extension of time be and the same hereby is granted; and it is

Order of New York State Court of Appeals

ORDERED, that the said motion for reargument be and the same hereby is denied.

Judge Alexander took no part.

/s/ Kathryn C. Brown

Kathryn C. Brown
Deputy Clerk of the Court

LETTER DATED AUGUST 2, 1983 BY PETITIONER TO JUSTICE GAMMERMAN

PHILLIPS & CAPPIELLO, P.C.
COUNSELLORS AT LAW AND PROCTORS IN ADMIRALTY
346 WEST 17TH STREET, NEW YORK, N.Y. 10011
(212) 929-8410
TELEX: 225686 SEAMN

August 2, 1983

Honorable Ira Gammerman
Justice of the Supreme Court
of the State of New York
60 Centre Street
Room 557
New York, New York

Attention: Ms. Laurel Rotker

Re: *Ugarte v. U.S. Lines, Inc.* Index No. 06143/79

Dear Ms. Rotter:

A motion for summary judgment in this action is presently awaiting decision by Judge Gammerman. We have recently learned that United States Lines, Inc. is charged with the maintenance of the German pier at which its vessel was docked at the time Mr. Ugarte was caused to sustain his injury.

A notice of deposition has been served upon the defendant to take the testimony of an individual with knowledge of the legal relationship between U.S. Lines, Inc. and the owners or operators of this dock. This relationship may require increased responsibility for pier safety by the defendant.

Letter by Petitioner to Justice Gammerman

We request that the court defer deciding the pending motion to permit the taking of this testimony.

Very truly yours,

PHILLIPS & CAPPIELLO, P.C.

by /s/ Edward M. Katz
Edward M. Katz

EMK/clg

cc: Kirlin, Campbell & Keating, Esqs.
Attn: R.A. Hulten, Esq.

MOTION TO EXTEND TIME TO FILE PETITION FOR CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

LUIS FRANK UGARTE,
PETITIONER

V.

UNITED STATES LINES
RESPONDENT

MOTION TO EXTEND TIME TO FILE PETITION FOR CERTIORI

QUESTIONS PRESENTED

1. Whether a shipowner may be found liable for breach of its duty to provide a seaman with a seaworthy vessel when it places a gangway in an area which makes it hazardous for crewmembers to return to the vessel because of the railroad cars blocking access to the gangway and inadequate lighting.

2. Whether a shipowner may be found liable for breach of its duty owed to a seaman under the Jones Act when it places its gangway in an area which makes it hazardous for crewmembers to return to the vessel because of railroad cars blocking access to the gangway and inadequate lighting.

3. Whether the New York Court of Appeals erred in dismissing plaintiff's cause of action without permitting plaintiff to introduce evidence as to operation and control of the pier on which plaintiff was injured.

Motion to Extend Time to File Petition

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

LUIS FRANK UGARTE,

PETITIONER

V.

UNITED STATES LINES

RESPONDENT

MOTION TO EXTEND TIME TO FILE PETITION FOR CERTIORI

To Mr. Justice Marshall:

Petitioner, herein, Luis Frank Ugarte, hereby makes the instant motion to extend the time to file a Petition for Certiori.

Jurisdiction

This Court's jurisdiction is invoked under Section 1257 (3) of Title 28, United States Code.

Jurisdiction Below

Petitioner brought suit in the Supreme Court of the State of New York pursuant to 46 USC § 688 and General Maritime

Motion to Extend Time to File Petition

Law. Respondents appealed the Order of the Supreme Court, New York County, Special Term Part I, entered on August 17, 1983 (a copy of which is annexed as Exhibit A), to the Appellate Division, First Department of the Supreme Court of the State of New York. The Appellate Division reversed the order of the Supreme Court, New York County, Special Term, Part I by decision dated November 8, 1984 (a copy of which is annexed as Exhibit B). Petitioner appealed to the New York State Court of Appeals based upon the jurisdiction set forth in the Civil Practice Laws & Rules of the State of New York (CPLR) § 5601(a)(ii). Petitioner was unsuccessful in his appeal as evidenced by the decision dated February 7, 1985 and entered on February 14, 1985. (A copy of which is annexed as Exhibit C.)

A motion (1) for extension of the time within which to reargue and (2) for reargument to the New York State Court of Appeals was made by Petitioner in compliance with § 500.11(g) of that Court's Rules of Practice. By Order dated March 28, 1985 (A copy of which is annexed as Exhibit D), the Court of Appeals granted Petitioner motion for extension of time and denied the motion for reargument.

Judgment Below

Petitioner's appeal to this Court based upon (1) the decision of the New York State Court of Appeals affirming the decision of the Appellate Division, Supreme Court of the State of New York and (2) the decision of the Court of Appeals denying petitioner's motion for reargument. Pursuant to 28 USC § 2101(c), petitioner has until June 26, or 90 days from the order denying rehearing, which was dated March 28, 1985, to file a Petition for Certiori.

Motion to Extend Time to File Petition

Why Time Should Be Extended

I, George J. Cappiello, Jr., attorney for Petitioner Luis Frank Ugarte, duly admitted before this Court, am fully familiar with the facts of this case. Due to the following reasons I have been rendered unable to file with this Court a timely Petition for Certiori on behalf of Mr. Ugarte:

1. In early June of this year one of our cases was immediately called to trial before the Honorable Morris E. Lasker of the United States District Court, Southern District of New York. This was a major case in which we represented a permanently disabled seaman. The matter required an entire week of trial preparation in addition to an entire week to try the case.

2. Additionally, during the past few months our office had lost a senior member of our associate staff, as well as a high level executive secretary. This senior associate was replaced by a recent law school graduate who is currently awaiting admission to the Bar. While our new associate has proved to be instrumental in his research of various technical and intricate theories of Maritime law regarding Mr. Ugarte's case, his lack of experience in this area has necessitated my presence in order to translate this research into a complete and refined Petition, sufficient for filing with this Court.

3. In addition to our office being short staffed in its legal department, the loss of one of our most qualified executive secretaries (who to date has not been replaced) has placed an additional burden upon our staff.

4. It is my firm belief that an additional 30 day period would enable our office to furnish Mr. Ugarte with the proper

representation that he so deserves. I beg this Court to grant petitioner's motion to extend his time to file a Petition for Certiori for an additional 30 day period.

Respectfully,

PHILLIPS & CAPPIELLO, P.C.

By /s/ George J. Cappiello

George J. Cappiello, Jr.
346 West 17th Street
New York, New York 10011
(212) 929 8410

ORDER, DATED JUNE 25, 1985, BY JUSTICE THURGOOD MARSHALL, GRANTING PETITIONER'S MOTION TO EXTEND TIME TO FILE PETITION FOR CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-960

LUIS FRANK UGARTE,

Applicant,

v.

UNITED STATES LINES, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 26, 1985.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 24th
day of June, 1985.

AFFIDAVIT OF PETITIONER IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 06143/79

LUIS FRANK UGARTE,

Plaintiff,

-against-

UNITED STATES LINES, INC.,

Defendant.

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK
S.S.:
COUNTY OF NEW YORK

LUIS FRANK UGARTE, being duly sworn, deposes and says:

I am the plaintiff in this action and submit this affidavit in opposition to defendant's motion for summary judgment.

Until May 24, 1978, I was a United States Merchant seaman. From March 27, 1978, until May 24, 1978, I was employed by United States Lines, Inc. aboard its vessel, the SS American Courier in the capacity of Oiler.

Affidavit of Petitioner

On information and belief on May 22, 1978 before 6:00PM, the vessel was docked at a pier in Bremerhaven, Germany, for the purpose of loading and unloading vessel cargo. The ship remained in Bremerhaven until at least the late morning hours of May 24. I left the vessel on May 23, 1978 between 6:30 to 7:00PM to go ashore. The ship was docked at a pier and alongside the pier were a series of railroad tracks level with the ground. Vessel cargo was loaded and unloaded from these railroad cars.

I was returning to the vessel later that night. At the time I returned, railroad cars were parked blocking the entrance to the vessel's gangway. There was no lighting between the cars and the ship. The space between the cars and the water edge of the pier was only a few feet and the base of the pier cranes narrowed the space even more. It would have been unsafe to approach the ship from this direction. In fact I knew then that two crew members of American ships had recently drowned in this port on their way back to their vessels.

I walked on a ramp adjacent to the railroad cars on the side furthest away from the vessel. The lighting there was better and there was no danger of falling into the water. When I came in line with the gangway, it was necessary for me to get down from the ramp and then to cross the tracks. However, railroad cars were blocking my path. It had been raining that night. As I climbed up on the platform of the coupling between two cars I was caused to slip off and fracture my left leg in several places. At the time of the accident I was a short distance from the foot of the gangway. I have been unable to return to any employment since.

My lawsuit against my employer is, I have been told, based on the Jones Act, 46 U.S.C. Sec. 688 et seq. It is my claim that United States Lines, Inc. or its agents including the pier owner

Affidavit of Petitioner

or operator had an obligation to provide me with a safe means of getting to the gangway. The absence of lighting between the ship and the railroad cars and the narrow walkway made that approach unsafe. The absence of any safe means of getting over the tracks caused my accident.

/s/ Luis F. Urgarte
LUIS F. URGARTE

Sworn to before me this
3d day of March, 1983

/s/ Edward M. Katz
NOTARY PUBLIC

EDWARD M. KATZ
Notary Public, State of New York
No. 44-2044051
Qualified in Rockland County
Commission Expires March 30, 1983

RELEVANT STATUTORY PROVISIONS

Jones Act, 46 U.S.C. §688;

§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250 § 33, 41 Stat. 1007.

Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §51;

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several

States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149 § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Relevant Statutory Provisions

Admiralty Jurisdiction Act, 46 U.S.C. § 740.

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage ha been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

June 19, 1948, c. 526, 62 Stat. 496.

Relevant Statutory Provisions

28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

June 25, 1948, c. 646, 62 Stat. 929.

FILED
AUG 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUIS FRANK UGARTE,

Petitioner,

—vs.—

UNITED STATES LINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

ROBERT ALEXANDER HULTEN
Counsel of Record
Attorneys for Respondent
KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does this case warrant the sparing exercise of the Court's extraordinary certiorari jurisdiction where the judgment of the New York Court of Appeals was based on its rules of procedure allocating the burden of proof for summary judgment which were applied properly to Federal precedent governing the Jones Act?

2. Should the General Maritime Law's warranty of seaworthiness be extended to pier areas where the shipowner has no control?

TABLE OF CONTENTS

PAGE

Counter-Statement of Questions Presented i

Table of Authorities v

Statement Pursuant to Supreme Court Rule 28.1 vii

Statement of the Case 1

Summary of Argument 2

Argument and Reasons for Denying the Writ 3

A. Petitioner failed to sustain his burden of proof according to State Procedure 3

B. Jones Act precedent was properly followed by the New York Court 5

C. Extension of the warranty of seaworthiness to the pier is not only inappropriate but precluded by precedent 8

Conclusion 10

Appendix

Text of Court Rule Forming Basis for 8A Order ... 42a

8A Order 45a

Excerpts from Original Motion Papers 48a

TABLE OF AUTHORITIES

Cases Cited: PAGE

Aguilar v. *Standard Oil Co.*, 318 U.S. 724, 736-737 (1944) 6

Bates v. *Prudential-Grace Lines*, 497 F. 2d 900 (9th Cir.), *cert. den.* 419 U.S. 1009 (1974) 6, 7

Carter v. *Union R.R. Co.*, 438 F. 2d 208 (3d Cir. 1971) . 6

Chesapeake & Ohio R.R. v. *Newman*, 243 F. 2d 804 (6th Cir. 1957) 6, 10

Columbia Ribbon v. *A-1-A Corp.*, 42 N.Y. 2d 496, 500, 398 NYS 2d 1004, 369 N.E. 2d 4 (1977) 4

Epling v. *M. Transport Elping Co.*, 435 F. 2d 732, 736 (6th Cir.), *cert. den.* 401 U.S. 961 (1973) 5

Friends of Animals, Inc. v. *Associated Fur Manufacturers, Inc.*, 46 N.Y. 2d 1065, 1067, 416 NYS 2d 790, 390 N.E. 2d 298 (1979) 4

Gaeta v. *New York News*, 62 N.Y. 2d 340, 350, 477 NYS 2d 82, 465 N.E. 2d 802 (1984) 3

Guttierez v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963) 3, 9

Hamilton v. *Marine Carriers Corp.*, 332 F. 2d 223 (ED PA. 1971) 6, 7n

Henry v. *S.S. MT. EVANS*, 227 F. Supp. 408 D. Md. (1964) 9

Hopson v. *Texaco, Inc.* 383 U.S. 262 (1966) 5, 6

Indig v. *Finkelstein*, 23 N.Y. 2d 728, 296 NYS 2d 370, 244 N.E. 2d 298 (1968) 4

Jeter v. *Starfish and Oyster Co.*, 482 F. 2d 457, 458 (5th Cir., 1973) 9

Martinez v. *Matson Navigation Company, et al.*, 1963 AMC 1188 (S.D. Ga. 1963)..... 7

PAGE

Roche v. *Hearst Corp.*, 53 N.Y. 2d 767, 439 NYS 2d 348, 421 N.E. 2d 840 (1981) 4

Romero Reyes v. *Marine Enterprises, Inc.*, 494 F. 2d 866 (1st Cir. 1974) 10

Shenker v. *Baltimore & Ohio RR*, 374 U.S. 1 (1963) ... 6

Sinkler v. *Missouri Pacific RR*, 356 U.S. 326 (1958) ... 5, 6

Thomas v. *Grigorescu*, 582 F. Supp. 514 (SDNY), *affirmed*, 751 F. 2d 371 (2d Cir. 1984)..... 5

Tim v. *American President Lines*, 409 F. 2d 385 (9th Cir. 1969)..... 6, 7

United States v. *Johnston*, 268 U.S. 220, 227 (1925) ... 2

Verrett v. *McDonough Marine*, 705 F. 2d 1437 (5th Cir. 1983)..... 5

Victory Carriers, Inc. v. *Law*, 404 U.S. 202 (1971) 3, 8, 9

Wheeler v. *West Indian S.S. Co.*, 205 F. 2d 354 (2d Cir. 1954)..... 8

Zuckerman v. *City of New York*, 49 NY 2d 557, 562, 427 NYS 2d 595, 404 N.E. 2d 718 (1980)..... 3, 4

Statutes and Rules Cited:

McKinney's 1982 Rules of Court § 660.35 1

New York Civil Practice Law and Rules 3212 (f) 4

Supreme Court Rule 17 2

Treatises:

Benedict on Admiralty—Vol. 1B, Hall-Saun-Bellman... 7n, 8, 9

New York Civil Practice—Vol. 4, Weinstein-Korn-Miller 5

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

UNITED STATES LINES, INC. is a wholly-owned subsidiary of McLean Securities, Inc. The latter is traded publicly on the New York Stock Exchange and approximately 90% of its shares is owned by Malcolm P. McLean.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-171

LUIS FRANK UGARTE,

Petitioner,

—VS.—

UNITED STATES LINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's version is basically accurate with several important exceptions.

There is no mention of the initial court's 8A Order which is similar to a pre-trial order in the United States District Courts pursuant to Federal Rule of Civil Procedure 16. The State authority for this rule at the trial level court is McKinney's 1982 New York Rules of Court § 660.35 (22 NYCRR 660.35), effective May 26, 1981, and is reprinted in respondent's portion of the appendix beginning at page 42a.

The relevant portion of the order is on page 45a, wherein discovery was to be completed by a certain date (no extensions were sought) and where the petitioner demonstrated his intention of deposing only seamen-witnesses, not respondent's personnel. This "8A Order" was part of the Record on Appeal which was filed with both New York appellate courts.

The petition also implies that the subject railroad cars magically appeared on the Bremerhaven dock after petitioner left the vessel at 6:30 P.M. and before his return at around 10:00 P.M. This contradicts the affidavit submitted below [35a] where Mr. Ugarte states that the vessel had been docked at that location for a complete day before his excursion.

More importantly, counsel neglects to inform the Court that Mr. Ugarte and a companion were drinking in the Bremerhaven Seamen's Club before their return to the vessel from shore leave. See the attached pages from plaintiff's Examination Before Trial, or Deposition, printed as part of the Appendix, 48-49a, which were part of respondent's original motion. Although he limits his consumption to only two beers in 3 hours, Mr. Ugarte does admit to half an hour of shopping at a later time when normal retailing would not occur.

SUMMARY OF ARGUMENT

Respondent, UNITED STATES LINES, INC., (USL) respectfully submits that the instant petition fails to present a single "special and important" reason warranting the issuance of a Writ of Certiorari. (See Supreme Court Rule 17.) On the contrary, the only real issue raised by the disposition below is whether the New York Court of Appeals correctly granted USL's motion for summary judgment because petitioner had failed to present sufficient admissible proof as to whether respondent violated any Jones Act duty.

Because that fact-bound determination presents no conflict with any decision of this Court or any Circuit, and because this Court's extraordinary certiorari jurisdiction is not properly invoked "to review evidence and discuss specific facts", the petition should be denied. See *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

In his Point II, petitioner takes about two pages to argue that the warranty of seaworthiness should be extended landward over pier areas beyond the gangway and that this is a

"re-occurring and most important issue . . . not yet addressed by this Court." The brevity of argument and dearth of authority are understandable in light of this Court's decision in *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971) which distinguished and re-affirmed *Guttierez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963) by limiting admiralty law to the end of the gangway except in unique circumstances not present in the case at bar.

ARGUMENT AND REASONS FOR DENYING THE WRIT

A. Petitioner failed to sustain his burden of proof according to State Procedure.

Stripped to its essentials, petitioner's argument is that a factual issue was created solely by Mr. Ugarte's affidavit, [35a]. This issue was the main contention in the motion for re-hearing, [21a-24a]. Deficiencies are claimed because USL personnel did not submit an affidavit and that issues were raised by respondent's counsel instead. Unfortunately, the procedural ground rules leading to the dismissal below have been misinterpreted.

Before considering whether a plaintiff puts forth sufficient proof to defeat a defendant's motion for summary judgment, the issue of whether the defendant established a defense must be addressed, *Zuckerman* v. *City of New York*, 49 N.Y. 2d 557, 562, 427 N.Y.S. 2d 595, 404 N.E. 2d 718 (1980). In this instance, USL put forth sufficient evidence in admissible form and petitioner raised no issue of material fact to support his claim of negligence or unseaworthiness. Merely because defendant's supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment. See *Gaeta* v. *New York News*, 62 N.Y. 2d 340, 350, 477 N.Y.S. 2d 82, 465 N.E. 2d 802 (1984), and *Zuckerman* v. *City of New York*, supra, page 563.

Supporting affidavits will be scrutinized with care and purely conclusory assertions will not and did not assist petitioner, see *Columbia Ribbon* v. *A-1-A Corp.*, 42 N.Y. 2d 496, 500, 398 N.Y.S. 2d 1004, 369 N.E. 2d 4 (1977) and *Indig* v. *Finkelstein*, 23 N.Y. 2d 728, 296 N.Y.S. 2d 370, 244 N.E. 2d 298 (1968), as well as *Friends of Animals, Inc.* v. *Associated Fur Manufacturers, Inc.*, 46 N.Y. 2d 1065, 1067, 416 N.Y.S. 2d 790, 390 N.E. 2d 298 (1979).

The substance and timing of petitioner's affidavit should be examined. He there states: "It is my claim that United States Lines or its agent including the pier owner or operator . . ." [36a]. This recitation comes after plaintiff had over 3 months to conduct whatever disclosure he felt was needed to prove the agency relationship. According to the 8A—Pre-Calendar Order [46a], petitioner did not even want to depose any of respondent's personnel. Mr. Ugarte's failure to employ discovery procedures cannot be held against respondent even if the relevant facts are solely within its knowledge, see *Roche* v. *Hearst Corp.*, 53 N.Y. 2d 767, 439 N.Y.S. 2d 348, 421 N.E. 2d 840 (1981).

Counsel for petitioner's August 2nd, 1983 letter [27a] is also woefully deficient. This correspondance seeks to re-open discovery almost 6 months after the service of respondent's motion papers and 5 months after Mr. Ugarte's conclusory affidavit enumerated his theories of liability.

The text of this August 2, 1983 letter to the initial court, while the motion was *sub judice* and after the close of discovery, is also interesting. Mr. Katz states: "We have recently learned that United States Lines, Inc. is charged with the maintenance[1] of the German pier at which its vessel was docked at the time Mr. Ugarte was caused to sustain his injury." The source of this knowledge is curiously never identified. An attorney's hearsay speculation was rightly ignored, see *Zuckerman* v. *City of New York*, *supra*.

---

1 Since the alleged cause of the accident was the positioning of railroad cars, it is difficult to see the relevance or even materiality of this statement.

Petitioner thus made three presentations to the New York Courts over a two-year period without ever offering any specific information justifying further inquiry. Mr. Ugarte's affidavit was sworn to on March 3, 1983; his counsel's *sub judice* letter was in August, 1983, while the plea for further discovery before New York's highest Court in the form of a motion for re-hearing was on March 14, 1985, [21a-24a]. A leading New York procedural treatise, 4 Weinstein-Korn-Miller, *New York Civil Practice*, states at page 51: "CPLR 3212(f) [the alternative basis for petitioner's rehearing] should not be used as a means of embarking on a 'fishing expedition' ".

B. Jones Act precedent was properly followed by the New York Court.

Epling v. *M. Transport Epling Co.*, 435 F. 2d 732, 736, (6th Cir.), *cert. den.* 401 U.S. 961 (1973), is an example:

> " . . . Even the sweeping non-delegable duty imposed by the Jones Act upon the employer to provide his employees with a safe place to work will permit the imputation of a third-party's negligence to the employer only where there has been a breach of some contractual duty owed by the third party to the employer."

A recent Federal Employers' Liability Act (FELA) case from the Second Circuit has a similar holding, see *Thomas* v. *Grigorescu*, 582 F. Supp. 514 (SDNY) affirmed 751 F. 2d 371 (1984). Former maritime attorney, and now Judge Haight, there found that the *Hopson* v. *Texaco*, 382 U.S. 262 (1966) and *Sinkler* v. *Missouri Pacific*, 374 U.S. 326 (1958) line of cases could only be invoked if definite proof of a specific contract between an independent contractor and the railroad or the shipowner is established. Absent such proof, FELA or Jones Act duty, "extends only to those areas over which the defendant or its agents exercise control", 582 F. Supp. at 518. See also *Verrett* v. *McDonough Marine*, 705 F. 2d 1437 (5th Cir., 1983).

Petitioner's use of precedent leaves something to be desired. He cites a series of cases [Petition, bottom of p. 8, top of p. 9], which do not lend much support to his cause. *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 736-737 (1944) was a maintenance and cure case which in *dicta* implied that a shipowner would not be liable for a pier operator's negligence, *Hamilton* v. *Marine Carriers Corp.*, 332 F. 2d 223 (ED Pa. 1971) was resoundingly rejected by the Ninth Circuit in *Bates* v. *Prudential-Grace Lines,* 497 F. 2d 900, *cert. den.* 419 U.S. 1009 (1974).

Counsel's *Aguilar* and *Hamilton* string ends with *Chesapeake & Ohio R.R.* v. *Newman*, 243 F. 2d 804 (6th Cir., 1957). This case is so easily distinguishable that its citation is almost misleading. In *Newman*, the shipowner and the railroad were the same entity and owned 90 acres of pier area. The plaintiff proved a custom and practice concerning certain overlapping duties between the ship and the shoreside employees of the involved facility. Finally, the accident occurred on a well-utilized path linking the ship with its marine office.

Merely because common elements of marine transportation such as railroads and piers are involved does not add anything. The Ninth Circuit dismissed a seaman's complaint in *Tim* v. *American President Lines*, 409 F. 2d 385 (1969), where serious injury occurred during the discharging or unloading of defendant's vessel and was caused by the stevedore's gantry crane operator. Plaintiff there also failed to prove the specific operational control or agency necessary to impose *Sinkler* or *Hopson* liability, 409 F. 2d at 388.

A large portion of the petition urges that longstanding Jones Act precedent has impliedly been overruled by two FELA cases, *Carter* v. *Union R.R. Co.*, 438 F. 2d 208 (3rd Cir., 1971) and *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. (1963). This exact argument was rejected by the lower court in *Bates* v. *Prudential-Grace Lines*, 357 F. Supp. 774, 777:

> "Although I recognize that this conclusion [of *Hamilton*] has some merit, I cannot give it great weight.

> First, I cannot conclude that either *Carter* or *Shenker* was intended to abrogate such a well-established rule . . ."[2]

[*Bates* was affirmed by the Ninth Circuit, 497 F. 2d 900, *cert. den.* 419 U.S. 1009 (1974).]

While the railroad workers' FELA and the seamen's Jones Act can judicially intersect, logistical considerations and operational reality preclude the transformation of a "landlubber" into a "seafarer". Respondent is not a property owner but is a vessel owner. A ship cannot choose its docking berth at a particular port. The local port authority will make that selection. Once assigned a berth, it must rely on the dock operator or owner. Various ancillary independent contractors, such as a railroad, become involved once a vessel begins to load or discharge. After mooring at a particular berth, the ship may be shifted to another location for a myriad of reasons and with short notice.

Furthermore, the AMERICAN COURIER was chartered to the U.S. Navy's Military Sealift Command which dictated her itinerary and schedules. See *Tim* v. *American President Lines, supra,* where the stevedore was also hired by the U.S. Government to handle its cargo so that it was an intervening entity precluding a direct link with the shipowner. Under those circumstances there was no Jones Act duty.

Petitioner's theories of failure to warn and inadequate lighting from the ship can also be eliminated. Mr. Ugarte knew of the possible configuration of shoreside equipment in Bremerhaven, and that he would be returning at night after shore leave [36a]. USL's knowledge was no greater. *Martinez* v. *Matson Navigation Company, et al.*, 1963 AMC 1188 (S.D. Ga. 1963), dealt with a similar accusation of a failure to warn:[3]

---

2 A leading treatise, 1B Hall-Saun-Bellman, *Benedict on Admiralty* [7th rev. ed.] § 29, p. 3-208, n. 21 further faults *Hamilton* for failing to consider the unique nature of shore leave—a feature of employment unknown to railroad workers.

3 This unofficial citation is quoted in its entirety and discussed in 1B, *Benedict on Admiralty, supra,* § 29, n. 21, p. 3-203. It also states, "when a seamen passing across the pier suffers injury by his own act, in no event does

> "The conditions which produced the libellant's [plaintiff's] injuries were as apparent to him before his accident as they might have been to the shipowner. There was no reason why the libellant, upon discovering the darkened condition of the pier, could not have returned to the ship and secured a flashlight or asked the master for assistance."

Plaintiff and his companion successfully negotiated the route from the ship to their libations at the Seamen's Club. Mr. De Oliveria also returned safely. Ignoring the premise that the proximate cause of the accident was the God-created rain which fell after sunset [testimony at 49a], whatever difficulties remained could have been easily conquered by the far-from-cumbersome, hand-held flashlight. See also *Wheeler* v. *West Indian S.S. Co.*, 205 F. 2d 354 (2nd Cir., 1954).

Petitioner has offered no conflict in the Circuits or any compelling reason to disregard longstanding precedent. This Court should reject his invitation to unnecessarily overrule a valid doctrine of admiralty, that there is no Jones Act duty owed to a shore-leave seaman beyond the end of the gangway, see cases referred to in 1B Benedict, supra, § 29, n.21 .

C. Extension of the warranty of seaworthiness to the pier is not only inappropriate but precluded by precede[illegible]

In *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (19[illegible], this Court settled the issue of the shipowner's liability for unseaworthiness where the injury occurs beyond the end of the gangplank. There is none unless the instrumentality causing the injury was in some way attached to the ship or under the control of the ship or its crew. For the same reason that the Jones Act claim fails for lack of proof as to the shipowner's control, a pursuit of an unseaworthiness theory would be equally futile.

---

the shipowner owe the seaman any great duty of care", p. 3-197, n. 17. See also cases cited pp. 3-200 through 3-208, n. 21.

Victory Carriers distinguished and reaffirmed the holding of *Gutierrez* v. *Waterman Steamship*, 373 U.S. 206 (1963), upon which petitioner relies. This Court noted that a maritime "function" such as stevedoring, which was being performed at a time of the injury in *Law*, was not crucial. The key fact in *Gutierrez* was that the injury was caused by an appurtenance of a ship, defective cargo containers, and occurred ashore so that the necessary ingredients for imposing liability under 46 U.S.C. § 740 were present, 440 U.S. 210-211.

Using terminology applicable to this Petition, *Victory Carriers* stated:

> "Respondent Law was not injured by equipment which was part of the ship's usual gear which was stored on board, the equipment which injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew and the accident did not occur aboard ship or on the gangplank. Affirmance of this decision below would raise a host of new problems as to the standards for and limitations of the applicability of maritime law to accidents on land. At least in the absence of explicit Congressional authorization, we shall not extend the historic boundaries of maritime law". 404 U.S. 213-214.

The principles of *Gutierrez* and *Victory Carriers* have been followed by the courts in seamen's personal injury litigation. See *Henry* v. *S.S. MT. EVANS*, 227 F. Supp. 408 (D. Md. 1964) and other cases cited in *1B-Benedict on Admiralty*, § 29 pp. 3-198 to 3-200, n. 18. None involves a shore leave situation which would be an inappropriate vehicle to change settled rules and where the Jones Act limits liability to the end of the gangway.

The only Appellate Court decision located which somewhat extended *Gutierrez* to a pier area is *Jeter* v. *Starfish and Oyster Co.*, 482 F. 2d 457, 458 (5th Cir., 1973). There the captain of a fishing boat slipped on fish slime as he walked on the pier

while fish were being unloaded. The court failed to hold the vessel unseaworthy, but found the defendant negligent in failing to clean the fish properly. The pier was actually owned by the same entity that owned the fishing boat and it had a vice president on the scene. It is thus similar to *Chesapeake & Ohio R.R.* v. *Newman, supra*, and distinguishable on the same grounds.

Petitioner cites *Romero Reyes* v. *Marine Enterprises, Inc.*, 494 F. 2d 866 (1st Cir. 1974), which actually is against him if read closely. It upheld the rule that the gangplank line is the presumptive boundary of admiralty jurisdiction. The First Circuit would not let the ship dodge its responsibility merely because this key appurtenance was owned by another entity.

CONCLUSION

This case is of no importance beyond the immediate parties. The New York Court of Appeals correctly applied its own procedural laws and controlling Federal precedent by granting respondent's Motion for Summary Judgment. Any extension of the doctrine of unseaworthiness to areas of the pier uncontrolled by the shipowner is not warranted based on the facts of this case.

Dated: New York, New York
August 9, 1985

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Respondent
14 Wall Street
New York, N.Y. 10005

ROBERT ALEXANDER HULTEN
Counsel of Record

APPENDIX

Text of Court Rule Forming Basis for 8A Order

§ 660.35. Mandatory Pre-Calendar Conferences: Applicable in New York County in Actions for Personal Injury or Wrongful Death in Which City of New York is Not a Party

(a) In all actions for personal injury or wrongful death, except actions in which the City of New York is a party, a precalendar conference shall be conducted before the note of issue is filed.

(b) Within sixty days after joinder of issue, the plaintiff shall serve on all parties who have appeared in the action a notice of pre-calendar conference to be held in Special Term, Part 8-A. Such notice, with proof of service upon all such parties, bearing an index number, and substantially in the form available in the calendar clerk's office, shall be filed by the plaintiff with the calendar clerk within five business days after service, and the calendar clerk shall place the action on a conference calendar.

(c)(1) The matters to be considered at the conference shall include:

(i) settlement of the action;

(ii) simplification and limitation of issues, where appropriate;

(iii) establishment of a timetable for the completion of all discovery proceedings; and

(iv) the granting of a general or special preference or the remanding of the action to the Civil Court.

(2) Except where a party appears in the action *pro se*, an attorney thoroughly familiar with the action, and authorized to act on behalf of the party, shall represent such party at the conference. The plaintiff shall submit at the conference a copy

THIS PAGE INTENTIONALLY LEFT BLANK

of the bill of particulars, if one was demanded, with proof of service upon all parties who have appeared in the action. If no bill of particulars has been demanded before the scheduling of the precalendar conference, the plaintiff nevertheless shall submit at such conference a bill of particulars containing the information specified in CPLR 3043(a), together with proof of service.

(d) At the conclusion of the conference the court shall render a written order, including its directions to the parties as well as stipulations of counsel. Alternatively, in the court's discretion, all directions of the court and stipulations of counsel may be recorded by a reporter. Where the latter procedure is followed, the parties shall procure and equally pay for a certified transcript thereof. The transcript, corrected if necessary on motion or by stipulation of the parties approved by the court, shall have the force and effect of an order of the court. The transcript shall be filed by the plaintiff with the clerk of the court.

(e) Continuation of a preference shall be conditional upon full compliance with the foregoing order or transcript. When a note of issue and certificate of readiness are filed in an action to which this section is applicable, the filing party, in addition to complying with all other applicable rules of the court, shall file with the note of issue and certificate of readiness a copy of the precalendar conference order or transcript and an affirmation or affidavit, with proof of service on all parties who have appeared, showing specific compliance with such order or transcript. In the discretion of the court, failure by a party to comply with the order or transcript, or the making of unnecessary or frivolous motions by a party, shall result in the imposition upon such party of costs or such other sanctions as are authorized by law.

(f) A motion in an action to which this section is applicable shall be made as follows:

(1) Motions that are made before the note of issue and certificate of readiness are filed, or that relate to an order

or transcript that has been rendered at a precalendar conference, shall be returnable at Special Term, Part 8—A, except as provided below.

(2) Motions in such actions in which a note of issue and certificate of readiness have been filed, but where the action has not been assigned to a conference and assignment or trial part, shall be made returnable in Special Term, Part 1 or 1—A, as appropriate, in the same manner as motions in actions to which the requirement of a precalendar conference under this section does not apply.

(3) Motions to dismiss or for summary judgment pursuant to CPLR 3211 or 3212, made before service of a precalendar conference notice, shall be returnable in Special Term, Part 1.

(4) Motions for disclosure pursuant to CPLR article 31, made before service of a complaint, or motions pursuant to CPLR 3042, or any other motions relating to a bill of particulars, made before service of a precalendar conference notice, shall be returnable in Special Term, Part 1—A.

(5) Motions to remove an action or proceeding from another court or for consolidation or severance, made before service of a precalendar conference notice, shall be returnable at Special Term, Part 1.

(6) Motions to dismiss for lack of prosecution where the plaintiff has not filed a precalendar conference notice shall be returnable at Special Term, Part 1.

(g) Motions for disclosure or other relief in actions to which this section is applicable, made after the bill of particulars has been served or after notice of precalendar conference has been filed, but before the precalendar conference is held, may be denied unless there is shown good cause why such relief is warranted before the required precalendar conference.

(h) A party may move to advance the date of a precalendar conference upon a showing of special circumstances.

8A Order

PRE-CALENDAR CONFERENCE ORDER
PURSUANT TO 22 NYCRR 660.35 EFFECTIVE MAY 26, 1981

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM PART 8A

Index Number 06143/79

Conference Number H 11938

Conference Date 10/28/82

LUIS UGARTE,

Plaintiff(s),

against

UNITED STATES LINES, INC.,

Defendant(s).

APPEARANCES:

Plaintiff(s) Neil Tolkiss
PHILLIPS & CAPPIELLO

Defendant(s) K.C. Hildebrandt
KIRLIN CAMPBELL & KEATING

I. INSURANCE COVERAGE:

☐ If not furnished, Plaintiff to be advised in
☐ Writing by

II. BILL OF PARTICULARS:

☐ 1. Not submitted: Action marked off calendar, or
☐ 2(A). Submitted: Satisfactory
☐ 2(B). Unsatisfactory
☐ 3. Supplemental Bill of Particulars to be served
☐ 4. Bill of Particulars for affirmative defenses to be served

III. MEDICAL REPORTS AND HOSPITAL AUTHORIZATIONS

☒ 1. Furnished (Except:
☐ 2. Medical reports or authorizations for records to be served
☐ 3. Hospital authorizations to be served

IV. PHYSICAL EXAMINATION: (Other Than Transit)

☒ 1(A). Held ☐ 1(B). Waived
☐ 1(C). Examination of _____ to be held _____
☐ 2(A). Physicians's report furnished
☒ 2(B). Copy of physician's report to be furnished to plaintiff within 60 days of examination

V. EXAMINATION BEFORE TRIAL:

☐ 1. Plaintiff ☐ Defendants ☐ All Parties
☒ 2. To be Held *Seamen witnesses by Jan. 31, 1983*[4]
☐ 3. Held (Except: _____) ☐ Waived

VI. OTHER DISCLOSURE:

☐ 1. None
☐ 2. All parties to exchange names and addresses of all witnesses, opposing parties statements and photographs. If none, an affirmation to that effect shall be exchanged.
☐ 3. Authorizations for plaintiff(s) employment records (IRS) including W-2 for period _____
☐ 4. _____
☐ 5. To be completed *Jan. 31, 1983*[4]

VII. IMPLEADER ACTIONS:

☐ 1. (A) None 1 (B) To be commenced

VIII. PREFERENCES:

☒ 1. (A) General preference granted
☐ 1. (B) Denied
☐ 2. Medical malpractice action: General preference not considered.

---

4 These italicized phrases were added to the standard form by counsel at the October 25, 1982 pre-trial conference.

☐ 3. General preference not determined pending further application after compliance with ___
☐ 4. (A) 325 (C) CPLR ☐ 4. (B) 325(D)
☐ 5. (A) 3403 (A)____ CPLR granted
☐ 5. (B) 3403 (A)____ denied
☐ 5. (C) 3403 (A)____CPLR held in abeyance pending further application/motion

IX. ADDITIONAL DIRECTIVES:

☐ 1. Court reporters minutes incorporated in order
☐ 2. See attached page for additional directives
☐ 3. None

X. _____

Is directed to file a Note of Issue and Certificate of Readiness on or Before *29 April 83*

XI. WHEN FILING THE NOTE OF ISSUE AND CERTIFICATE OF READINESS THE FILING PARTY SHALL SERVE A COPY OF THIS ORDER, TOGETHER WITH AN AFFIRMATION STATING COMPLIANCE WITH ALL DIRECTIVES OF THIS ORDER AND AN AFFIDAVIT OF SERVICE ON THE CALENDAR CLERK AND ALL PARTIES. IN THE EVENT OF NON-COMPLIANCE, COSTS OR OTHER SANCTIONS MAY BE IMPOSED.

THIS CONSTITUES THE DECISION AND ORDER OF THE COURT.

Dated: 10/25/82

Enter:

/s/ [Alfred Ascione]
J.S.C.

ALL DATES CONTAINED HEREIN RELATING TO THE COMPLETION OF ITEMS IN THIS ORDER **MUST** BE ADHERED TO. COUNSEL MAY NOT ENTER INTO ANY ADJOURNMENTS WITHOUT FURTHER ORDER OF THIS COURT.

Excerpts from Original Motion Papers

claiming a breach of the warranty of unseaworthiness under the General Maritime law for injuries allegedly sustained on May 24, 1978, when defendant's ship, the S.S. AMERICAN COURIER, was berthed at Bremerhaven, Germany, on May 24, 1978.

3. Even though this maritime action has been instituted in State Court, Federal Maritime law governs and this Court's sole responsibility is to determine the applicable Federal law, *Alvez v. American Export*, 46 N.Y. 2d 634.

4. It is clear from plaintiff's testimony in his examination before trial that he was injured while returning to the vessel from shore leave as he fell in between two railroad cars in an area not under the defendant's control. This can be shown in the following excerpts:

EBT—Page 7.

"Q. Where did you have the accident?

A. I had the accident coming back from shore, as I was trying to go between the cars. I climbed on a platform and fell. The place was wet and slippery on account of the rain.

Q. What time did you go ashore?

A. I went ashore between about 6:30 and 7:00 P.M.

EBT—Pages 12-13.

Q. Now, on the dock alongside which the ship was tied up, were there any railroad tracks?

A. Yes.

Q. Do you remember how many?

A. There were boxcars there, they were a long way from one end to the other. So the safest way to go to the ship was to walk to the left, to walk around the cars to get to the gangway.

Q. Let's put it this way, from the gangway to the closest railroad car what was the distance about?

A. I would say, from here to the wall, that would be the gangway. I don't know how far it would be.

Q. 10 feet, approximately?

A. Yes I know it's near that.

EBT—Pages 16-17.

Q. Before you got to the railroad cars, did you walk up onto a loading platform and jump off that loading platform, on the ground?

A. I remember climbing between the cars, between the boxcars and standing on a platform. Then I slipped and fell. I fell because of the rain, it was slippery. It was wet and slippery."

5. It is also clear from the same testimony that plaintiff was on shore leave conducting personal affairs unrelated to the ship's business:

EBT—Pages 22-23.

Q. When you first went ashore that evening with Mr. DeOliveria, you say you went to the Seamen's Club. Did you have anything to drink there?

A. Yes, I had two beers.

Q. You say you left the Seamen's Club?

A. Yes.

Q. About what time did you leave the Seamen's Club?

A. About 9:00 o'clock, 9:30, something like that. It may have been 10:00 o'clock, then we got back to the ship.

Q. After you left the Seamen's Club, did you go to any other bar in Bremerhaven?

A. No.

Q. Did you have anything else to drink after you left the Seamen's Club?

A. No.

Q. You say you went shopping after you left there?

A. Yes, then back to the ship."